

IN THE COURT OF APPEALS OF TENNESSEE
AT KNOXVILLE
Assigned on Briefs July 22, 2009

IN RE ASHLEY M.

**Appeal from the Juvenile Court for Sullivan County
No. BCJ-13125 Paul R. Wohlford, Judge**

No. E2009-00517-COA-R3-PT - FILED SEPTEMBER 29, 2009

This is termination of parental rights case. In July 2005, Ashley M. (DOB: June 3, 1993) (“the Child”) was adjudicated dependent and neglected. Two years later, the State sought to terminate the parental rights of Vicky M. (“Mother”) and James M. (“Father”). Following a hearing, the trial court found (1) that grounds alleged in support of the petition had been clearly and convincingly established and (2) that the proof showed, again clearly and convincingly, that it is in the Child’s best interest to terminate the parental rights of both parents. The trial court ordered that the rights of both parents were terminated.¹ Mother appeals, but only as to the denial of her motion to continue the hearing below. We affirm.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Juvenile Court
Affirmed; Case Remanded**

CHARLES D. SUSANO, JR., J., delivered the opinion of the court, in which D. MICHAEL SWINEY and JOHN W. McCLARTY, JJ., joined.

C. Brad Sproles, Kingsport, Tennessee, for the appellant, Vicky M.

Robert E. Cooper, Jr., Attorney General and Reporter; Michael E. Moore, Solicitor General; and Jill Z. Grim, Assistant Attorney General, for the appellee, Tennessee Department of Children’s Services.

OPINION

¹Father did not appear at the hearing below and the trial court entered a default judgment against him. He did not file a notice of appeal and is not a party to this appeal.

I.

The Child was 15 at the time of the trial in January 2009, and had been in the custody of the Tennessee Department of Children's Services ("DCS") for over three and a half years. The record reflects that, in May 2005, by order of the trial court, the Child was placed in the temporary custody of Mother's sister, Donna Sage. The placement was based upon the court's finding that Mother was unable to care for the Child. At the end of June 2005, Ms. Sage returned the Child to DCS stating that, due to the Child's behavior, she could no longer care for her.

In July 2005, DCS filed a petition seeking to have the Child adjudicated dependent and neglected. The Child was brought into the protective custody of DCS and placed in foster care. At that time, Mother underwent a psychological evaluation which revealed that she was functioning with "limited cognitive abilities" as a result of her "mild mental retardation." In September 2005, the court approved a permanency plan with the concurrent goals of (1) reunification of the Child with Mother and (2) placement of the Child in State custody or with a relative. However, the relative, Ms. Sage, advised that she no longer wanted to be involved in the case. Following a permanency hearing in July 2006, the court found that Mother had made some progress with respect to the tasks she was to complete under the plan, but that she would need an observational parenting assessment with recommendations for her to follow, family counseling, and a demonstrated ability to care for the Child. The trial court determined that it was in the Child's best interest for the State to delay the filing of a petition to terminate.

Beginning in July 2006, DCS added adoption as a goal in the event reunification could not be achieved. At a status review in December 2006, the court found that continued placement of the Child in a foster home was appropriate while Mother underwent a parenting assessment and additional behavioral testing that DCS had requested in view of Mother's mental deficiencies. In July 2007, the trial court found that Mother was competent to participate in a termination proceeding and ordered DCS to file such a petition to terminate by August 15, 2007. On August 8, 2007, DCS did as directed. With respect to Mother, the petition alleged that she had failed to provide a suitable home for the Child and had failed to substantially comply with the permanency plans. In addition, the petition alleged that the conditions that had led to the removal of the Child from Mother's custody were still persisting and were not likely to be soon remedied. Lastly, the petition alleged that it was in the best interest of the Child that Mother's parental rights be terminated.

A hearing on the petition was initially set for November 2007, then twice continued when a guardian ad litem was appointed for the Child. In February 2008, Attorney Sproles was appointed to represent Mother. The hearing was continued to March 2008 before finally being heard in January 2009. On March 4, 2009, the court entered an order terminating both parents' rights to the Child. In terminating Mother's rights, the court noted the evidence did not show, clearly and convincingly, that Mother had not complied with the permanency plans. The trial court observed, however, that while the evidence showed that Mother had substantially completed the tasks assigned to her in the plans, "her ability to parent the child did not significantly improve despite the services, counseling and training provided." It further noted that Mother was "unable to either comprehend or retain the training" or "apply the techniques and abilities required to effectively parent the child." The court

stated that Mother's failures were not a reflection of her non-compliance, but, rather, were due to her mental limitations.

Next, the trial court found that there was clear and convincing evidence to establish that persistent conditions – “parent role reversal,” Mother's inability to understand and demonstrate appropriate techniques to parent a teenager, and an unsafe environment in the vicinity of the home – remained such as to prevent the Child's safe return to Mother's custody. As an additional ground, the court found that DCS had established Mother's mental incompetence to care adequately for the Child. Lastly, the court found, by clear and convincing evidence, that termination of Mother's rights is in the best interest of the Child. Mother timely appealed.

II.

On appeal, Mother raises one issue:

The trial court erred in denying Mother's motion to continue and proceeding to a hearing on the merits of the State's petition to terminate Mother's parental rights in violation of Mother's due process rights.

The State defends the trial court's ruling on Mother's motion. It also argues that the evidence does not preponderate against the trial court's rulings on grounds for termination and the best interest of the Child.

III.

Our review is de novo upon the record, which come to us accompanied by a presumption of correctness as to the findings of fact of the trial court, a presumption we must honor unless the preponderance of the evidence is to the contrary. Tenn. R. App. P. 13(d); *Bogan v. Bogan*, 60 S.W.3d 721, 727 (Tenn. 2001). A trial court's conclusions of law are subject to a de novo review with no presumption of correctness. *Southern Constructors, Inc. v. Loudon County Bd. of Educ.*, 58 S.W.3d 706, 710 (Tenn. 2001).

“The granting or denial of a motion for a continuance lies in the sound discretion of the court.” *State Dep't of Children's Services v. V.N.*, 279 S.W.3d 306, 317 (Tenn. Ct. App. 2008)(quoting *Blake v. Plus Mark, Inc.*, 952 S.W.2d 413, 415 (Tenn. 1997)). The Supreme Court has described the abuse of discretion standard as follows:

Under the abuse of discretion standard, a trial court's ruling will be upheld so long as reasonable minds can disagree as to propriety of the decision made. A trial court abuses its discretion only when it applies an incorrect legal standard, or reaches a decision which is against logic or reasoning that causes an injustice to the party complaining. The abuse of discretion standard does not permit the appellate court to substitute its judgment for that of the trial court.

Eldridge v. Eldridge, 42 S.W.3d 82, 85 (Tenn. 2001) (internal citations omitted). “When reviewing a trial court’s discretionary decision, appellate courts should begin with the presumption that the decision is correct and should review the evidence in the light most favorable to the decision.” *Overstreet v. Shoney’s, Inc.*, 4 S.W.3d 694, 709 (Tenn. Ct. App. 1999).

IV.

Mother challenges the trial court’s denial of her motion to continue the termination hearing. She contends that she was forced to proceed in the absence of constitutionally-provided due process safeguards thereby leaving her unable to mount any meaningful defense to the petition of DCS.

Prior to the presentation of proof, Mother’s counsel moved the court to continue the hearing “to allow [counsel] time to work with [Mother] and see if we can increase her level of understanding to get her to a point where this type of proceeding is not quite so traumatic.” Counsel further noted that it was the “first opportunity” he and Mother had had to meet, that he had “serious questions about her level of understanding” of the proceeding, and that Mother, understandably, was “very emotional about the situation.” The State objected to a continuance, noting the length of time that the Child had been in its custody and the time that the petition had been pending. The following exchange occurred:

The Court: The Order of July the 16th, 2007 found not only that [Mother] was competent to participate in such a proceeding, it was further found that the [DCS] had made reasonable efforts to achieve permanency in the matter. And the Department was given until August the 15th, 2007 in which to file a petition for termination of parental rights, which it did.

* * *

This Court, Mr. Sproles, a year and a half ago set deadlines for this matter to be filed and it was filed in August and it is now . . .

Mother: And I didn’t sign no papers.

The Court: . . . a year and [a] half later. You know, we’ve advanced no further and it seems to me that the need for permanency for the child outweighs the potential benefits of a further continuance on this matter. I think this is a matter that needs to be heard. This child has been in foster care how long, Mr. Goergen?²

Mr. Goergen: Over three and a half years, Your Honor.

²Mr. John M. Goergen represented DCS in the trial court.

Mother: Yeah, but I've been trying to get her back and you all won't let me have her back.

The Court: I . . .

Mother: I don't care. I'm opening up my mouth and letting him know how I feel.

The Court: I don't know that a continuance would not result in us being in the same place we are now if we continued it for 30 days or 60 days or 90 days. I cannot find that that would be a benefit and I'll hear anything the guardian would like to say with regard to this.

Mother: Not a thing. I ain't . . .

Mr. Fabus³: Judge, I would also remind the Court that once a TPR has been filed, it's supposed to be tried within six months, and the only way a Court is supposed to continue it outside that six months window is if you can specifically make a finding that it's in the best interest of the child to continue it.

The Court: Well, I don't find that and I think that this Court and [DCS] have tried to be as accommodating as possible to the mother as far as the hearing of this case goes. And respectfully, Mr. Sproles, I'm going to overrule your motion.

In short, Mother's counsel sought a continuance on her behalf in an effort to get more time to remedy Mother's "level of understanding" of the proceeding. Mother requests that this court remand for a "full evidentiary hearing" at the earliest possible date. In support of her position, Mother notes that one of the grounds for terminating her rights was the trial court's finding that she was mentally incompetent to provide adequate, further care for her child. *See* Tenn. Code Ann. § 36-1-113(g)(8)(B)(I).

Trial courts have wide discretion in determining whether a motion for continuance should be granted, but the court must exercise this discretion in an efficient manner. *Coakley v. Daniels*, 840 S.W.2d 367, 370 (Tenn. Ct. App. 1992). The age of the cause of action is a primary factor for consideration by the trial court in determining whether a continuance is justified. *Id.* As noted earlier, we will not disturb a trial court's ruling on such a motion unless the record clearly shows abuse of discretion and prejudice to the party seeking a continuance. *Blake v. Plus Mark, Inc.*, 952 S.W.2d 413, 415 (Tenn. 1997).

³Mr. Jerry Fabus served as Child's guardian ad litem at the time of the hearing.

The record reflects that the case had proceeded to the point that a petition to terminate parental rights was filed only after Mother failed to demonstrate the ability to care for the Child appropriately and had failed to remedy the persistent conditions that had prompted the Child's removal from Mother's custody. The final hearing was continued multiple times, and counsel was appointed to represent Mother 11 months before the hearing took place. There is no indication in the record or Mother's appellate brief why counsel and Mother met for the first time on the day of the long-scheduled hearing. At that point, the Child had been in foster care for more than three and a half years and was 15 years old. Asked during her testimony whether she would like the proceedings just to be "done with," the Child answered "yes." She further testified as follows:

[The Court]: Now, I guess you'd probably say that there is a meaningful relationship between you and your mother?

[The Child]: Yes.

[The Court]: What do you think it would be like if you had to go back and live with her, though?

[The Child]: Well, bad.

[The Court]: Can you say anything more or does that just kind of sum it up? You said bad.

[The Child]: Yeah, just bad.

[The Court]: When you lived with your mom, do you feel like you had to take care of her quite a bit?

[The Child]: Yes.

[The Court]: Do you feel like it would be in your best interest to terminate your mom's rights?

[The Child]: Yes.

[The Court]: What's – I guess, what's the biggest reason that you feel like that?

[The Child]: Because I can't go back and live with her and I don't want to be in foster care anymore.

[The Court]: So you'd like to be able to be adopted?

[The Child]: Yes.

Mother insists that by refusing to continue the hearing, the trial court forced her to participate in a proceeding that she did not understand and left her unable to contribute to her defense. She points particularly to the following exchange which took place essentially at the end of the hearing, immediately after the State had completed its proof:

The Court: Anybody you want to call Mr. Sproles?

Mr. Sproles: Well, Judge, I'd make a motion that the State's not carried the burden here showing adequate grounds for termination.

The Court: Overruled. Overruled or I'll reserve ruling on that until the end of the entire trial. For the time being, it's overruled.

Mr. Sproles: Judge, if I could have just one moment?

The Court: Uh-huh.

[Mother]: I would like to put it off and have another Court date. Something ain't going right.

[Mother crying, off the record].

The Court: All right, Mr. Sproles, anything else?

Mr. Sproles: Judge, I'm in a position where I can't communicate with my client.

The Court: I'm not going to make you sit there and . . .

Mr. Sproles: Without that input, I can't call any witnesses.

The Court: I understand that.

Mother relies on this testimony and other outbursts and interruptions on her part throughout the hearing in an effort to demonstrate that the denial of a continuance prejudiced her. She does not, however, argue how she was prejudiced or what she would have done differently had she been granted more time to prepare, such as, for example, what other witnesses she would have called or how her "level of understanding" and emotional state could have been improved in the interim. In *State Dep't of Children's Services v. V.N.*, 279 S.W.3d at 317-18, the Supreme Court rejected a mother's challenge to the denial of a continuance based on the fact that she was appointed counsel only 45 days before the termination hearing was held and her contention that she needed more time to investigate and prepare her case. The Court relied, in part, on its observation of the "Legislature's clear directive regarding expediting contested parental termination proceedings" as set forth in Tenn. Code Ann. § 36-1-124 (2005). That section provides in relevant part as follows:

(a) In all cases where the termination of parental rights or adoption of a child is contested by any person or agency, the trial court shall, consistent with due process, expedite the contested termination or adoption proceeding by entering such scheduling orders as are necessary to ensure that the case is not delayed, and such case shall be given priority in setting a final hearing of the proceeding and shall be heard at the earliest possible date over all other civil litigation other than child protective services cases arising under title 37, chapter 1, parts 1, 4 and 6.

* * *

(c) It is the intent of the general assembly that the permanency of the placement of a child who is the subject of a termination of parental rights proceeding or an adoption proceeding not be delayed any longer than is absolutely necessary consistent with the rights of all parties, but that the rights of the child to permanency at the earliest possible date be given priority over all other civil litigation other than child protective services cases arising under title 37, chapter 1, parts 1, 4 and 6.

“The ultimate goal of every proceeding involving the care and custody of a child is to ascertain and promote the child’s best interest[.]” *White v. Moody*, 171 S.W.3d 187, 192 (Tenn. Ct. App. 2004). In our view, the trial court correctly employed this standard when it considered all of the relevant facts and found that “the need for permanency for the child outweighs the potential benefits of a further continuance. . . .” Given no specifics as to what Mother expected or even hoped to achieve by further delaying the termination hearing, the evidence does not preponderate against this finding. The trial court did not abuse its discretion in denying the motion to continue.

V.

Mother does not challenge the trial court's underlying holdings that (1) multiple grounds supporting termination of her parental rights were established by clear and convincing evidence and (2) the evidence clearly and convincingly showed that termination of Mother's parental rights is in the Child's best interest. *See In re F.R.R., III*, 193 S.W.3d 528, 530 (Tenn. 2006). Even though Mother does not raise any issues regarding the substances of these rulings, this court, in the interest of justice, has reviewed the record with respect to each of them. We conclude, in keeping with the standards set forth in *In re F.R.R., III*, that the evidence does not preponderate against the trial court's findings. Accordingly, we conclude that the trial court properly terminated Mother's parental rights.

VI.

The judgment of the trial court is affirmed. Costs on appeal are taxed to the appellant, Vicky M. This case is remanded to the trial court, pursuant to applicable law, for enforcement of the court's judgment and for the collection of costs assessed below.

CHARLES D. SUSANO, JR., JUDGE